IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

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| In the matter of: | ) | |
| | ) | Adversary Proceeding |
| THOMAS E. COLLINS | ) | |
| d/b/a Coastal Motors | ) | Number 90-2024 |
| (Chapter 7 Case 90-20339) | ) | |
| | ) | |
| Debtor | ) | |
| | ) | |
| | ) | |
| | ) | |
| THRIFT INDUSTRIES, INC. | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| THOMAS E. COLLINS | ) | |
| | ) | |
| Defendant | ) | |

**MEMORANDUM AND ORDER**

On November 7, 1990, a trial was held on a Complaint to Determine Dischargeability of a certain business related debt. Upon consideration of the evidence adduced at trial, the briefs and other documentation submitted by the parties, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On August 31, 1982, the Plaintiff, Thrift Industries, Inc. ("Thrift") and the Debtor entered into a written agreement for

the purpose of financing a used car dealership. Under the terms of the Agreement, the Debtor, as agent for Thrift, was authorized to draw bank drafts upon a Thrift account for the purpose of purchasing motor vehicles for Thrift (paragraph 2, Agreement). The Debtor was to place the vehicles on his own used car lot for sale. Within 24 hours of the sale of a vehicle acquired under the Agreement, the Debtor was to pay Thrift the amount expended by Thrift plus a portion of the sale proceeds based upon a rate schedule set forth in the Agreement (paragraph 4, Agreement). The Agreement further provided if a vehicle remained unsold for 35 days, the Debtor would be required to either purchase the vehicle from Thrift or tender a portion of the purchase price in accordance with the aforementioned rate schedule as anticipated profits.

If the vehicle remained unsold for another 35 days, the Debtor would be required to purchase the vehicle in accordance with the rate schedule set forth in the Agreement without regard to any sum previously paid as anticipated profits (paragraph 4, Agreement).

It was established that between August, 1982, and sometime in 1986, Debtor sold several automobiles which had been acquired with Thrift funds but failed to turn the proceeds over to Thrift in accordance with the terms of the Agreement. The stipulated amount of the Debtor's obligation to Thrift was $46,265.00.[1] The Debtor testified that he had fallen behind on his

[1] Paragraph 3 of the Agreement provides: "The party of the second part [Debtor] is limited in the total of funds that he may expend on behalf of the party of the first part [Thrift] to a total of $10,000.00, except that such amount may be modified by an additional amount equal to the purchase price of the vehicle, whenever a vehicle purchased by the party of the second

payments to Thrift since 1986, and produced records to show that the strict time limits set forth in the Agreement were not enforced (Defendant's Exhibit 3). The Debtor further testified that some of the arrearage was due to his inability to collect bad debts from their parties which had financed the vehicles through his dealership.

Mr. Donald R. Sullivan, former president, chief executive officer and sole stockholder of Thrift died in February, 1990, and the present action is brought on behalf of his estate.

## CONCLUSIONS OF LAW AND ORDER

The Plaintiff seeks to have the debt owing to Thrift excepted from discharge pursuant to 11 U.S.C. Section 523(a)(6) which provides in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
>
> (6) for willful and malicious injury to . . . the property of another entity.

The dominant purpose of the bankruptcy laws is to provide the debtor with comprehensive, needed relief from his financial burden by releasing him from virtually all of his debts. To accomplish this goal, the courts have narrowly construed exceptions to discharge against the creditor and in favor of the bankrupt. Thus, the burden of proof lies with the creditor to show

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part [Debtor] is sold by either party.

that the particular debt falls within one of the statutory exceptions. The exceptions to discharge were not intended and must not be allowed to override the general rule favoring discharge. Murphy & Robinson Investment Co. v. Cross (Matter of Cross), 666 F.2d 873, 879-80 (5th Cir. 1982) (footnotes and citations omitted). When a creditor seeks to have a debt declared non-dischargeable, the creditor bears the burden of proof by a preponderance of the evidence. Grogan v. Garner, _____ U.S. _____, 111 S.Ct. 654, Bankr. L. Rep. 73746A (Jan. 15, 1991) (No.89-1149).[2]

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[2] In Grogan, a unanimous Supreme Court announced that the proper standard of proof for exceptions to discharge under Section 523(a) of the Bankruptcy Code is a preponderance of the evidence, rather than clear and convincing evidence. In reversing the Eighth Circuit, Justice Stevens wrote:

> Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.' We have previously held that a debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy. We also do not believe that, in the context of provisions designed to exempt certain claims from discharge, a debtor has an interest in discharge sufficient to require a heightened standard of proof.

Id. (citations omitted). The Grogan holding effectively overrules the Eleventh Circuit holding in Schweig v. Hunter (In re Hunter), 780 F.2d 1577 (11th Cir. 1986), to the extent that the clear and convincing standard

In order to except a debt from discharge under Section 523(a)(6), the creditor must prove three elements by a preponderance of the evidence:

1) That the debtor injured another entity or the property of another entity;

2) That the debtor's actions were deliberate and intentional;

3) That the debtor's actions were malicious.

It was stipulated that the Debtor is indebted to Thrift in the amount of $46,265.00 and hence Thrift has been injured by the Debtor's failure to turn over those funds in accordance with the Agreement.

The Eleventh Circuit in Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988), approved and adopted the approach set forth in United Bank of Southgate v. Nelson, 35 B.R. 766 (N.D.Ill. 1983), in construing the "willful and malicious" elements of 11 U.S.C. Section 523(a)(6). Under Southgate, "willful means deliberate or intentional" and "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice." Rebhan, 842 F.2d at 1263. "No showing of personal hatred, spite or ill-will is required to prove an injury malicious; it is enough that it was 'wrongful and without just cause or excuse'." In re Lindberg, 49 B.R. 228, 230 (Bankr. D.Mass. 1985) (quoting In re Askew, 22 B.R. 641, 643 (Bankr. M.D.Ga. 1982), aff'd, 705 F.2d 469 (11th Cir. 1983). Hence, an injury is considered "willful" if it is

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applied in this Circuit.

intentional and "malicious" if it results from an intentional or conscious disregard of one's duties. Id.

The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, is a willful and malicious injury within the meaning of the Section 523(a)(6) exception. Matter of McLaughlin, 14 B.R. 773, 775 (Bankr. N.D.Ga. 1981); 3 Collier §523.16 at p.523-116 (15th Ed. 1989). Absent a finding of willful intent to harm another, the debt is dischargeable in bankruptcy. A showing of a mere "technical conversion" of another's property rights is insufficient to prevent discharge, even if sold in reckless disregard of the other's rights. Farmers & Merchants Bank of Eatonton v. Alexander, 70 B.R. 419, 422 (M.D.Ga. 1987); Brinsfield, 78 B.R. at 370.

"[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be an injury which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one." Davis v. Aetna Acceptance Co., 293 U.S. 328, 331, 55 S.Ct. 151, 153 (1934) (citations omitted).

Once it is determined that a debtor has willfully converted the property of another, the determination of whether such debt will be held non-dischargeable under Section 523(a)(6) turns on

the intent of the debtor. In assessing the intent of the debtor, a businessperson will be held to a higher standard than an ordinary individual where it is clear that that businessperson would be more knowledgeable of the natural consequences of his acts. Matter of Ricketts, 16 B.R. 833, 834-35 (Bankr. N.D.Ga. 1982).

It is difficult to prove that one holds a purposeful intent to harm another. However, when one acts with the knowledge that his act of conversion is in contravention of the rights of another yet proceeds deliberately and intentionally in the face of that knowledge, without justification or excuse, this Court will infer malice and render such debt non-dischargeable under Section 523(a)(6). See Ford Consumer Finance Company v. Eberhart and Allen, Ch.7 Case Nos. 89-20110 and 89-20112, Adv. Nos. 89-02011 and 89-2012, slip. op. at 9 (S.D.Ga. Nov. 22, 1989).

It is apparent from the records produced by the Debtor that the terms of the Agreement were not strictly enforced and that, sometime between 1982 and 1990, the parties' course of dealing had departed from that set forth in the Agreement. Nonetheless, to the extent that proceeds from the sale of vehicles came to the Debtor, he had an obligation to turn those proceeds over to Thrift and the wrongful retention of those funds constitutes conversion and thus, a non-dischargeable debt under Section 523(a)(6). On the other hand, to the extent that the Debtor's obligation to Thrift constitutes accumulated fees on cars held over 35 days, or arises from uncollectible bad debts, I find that that portion of the debt is a dischargeable unsecured debt.

Based upon the record, it is unclear what portion of the $46,265.00 admittedly owed constitutes proceeds from the sale of vehicles which actually came into the Debtor's possession but were not turned over to Thrift. Inasmuch as that portion of the debt will be deemed non-dischargeable, the parties are ordered to conduct discovery and file a stipulation as to the amount of the debt which constitutes actual proceeds from the sale of vehicles out of trust, within sixty (60) days from the date of this Order.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This _____ day of February, 1991.